ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Standardized and Enhanced	)	MM Docket No. 00-168
Disclosure Requirements for	)	
Television Broadcast Licensee	)	
Public Interest Obligations	)	

TRINITY BROADCASTING NETWORK'S COMMENTS ON PROPOSED RULEMAKING

I. Introduction

Trinity Christian Center of Santa Ana, Inc., d/b/a Trinity Broadcasting Network, in response to the request for commentary on the proposed above-entitled rulemaking proceeding, FCC 00-345, released on October 5, 2000, hereby submits the following commentary.

The principle of the federal nondelegation doctrine is straightforward. A federal agency tasked with enforcing a congressional mandate, may not venture beyond the scope of that legislative directive and use it as a platform for creating new rules and regulations. When that occurs, the federal agency has unconstitutionally stepped into the legislative role delegated under the U.S. Constitution to the Congress.

The proposed Rulemaking trenches onto congressional authority in this manner by legislating an entirely new regime of disclosure requirements as a legislative interpolation to the congressional mandate for transition to digital technology. In the absence of clear and direct congressional authority, such attempts to legislate are unconstitutional and imminently challengeable.

II. THE CONSTITUTION DOES NOT PERMIT FEDERAL AGENCIES TO CREATE NEW LAWS OUT OF WHOLE CLOTH

The separation of powers plays a crucial role in our constitutional framework. As the U.S. Supreme Court has noted, "The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." *Buckley v. Valeo*, 424 U.S. 1, 124 (1976). Although many aspects of the Constitution are premised on the importance of checks and balances, central to the Framers' design was the distribution of the federal government's power among three coordinate branches, with legislative powers vested in Congress, executive powers vested in the President, and judicial powers vested in this Court as well as such inferior courts as Congress would establish. See U.S. Const. art. I, § 1; art. II, § 1; art. III, § 1.

This arrangement is not designed to secure efficiency or to promote administrative convenience; rather, "[t]he ultimate purpose of this separation of powers is to protect the liberty and security of the governed." *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.* 501 U.S. 252, 272 (1991). Accordingly, the Supreme Court often has rejected efforts by Congress and the President to rearrange power in a manner hostile to our constitutional framework. In various cases over the last 25 years, the Supreme Court has struck down congressional enactments as contrary to the constitutionally mandated separation of powers.[1] In these and other cases, the Supreme Court reached the same conclusion whether

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[1] *See e.g., Bowsher v. Synar*, 478 U.S. 714, 722 (1986) ("That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured . . . to provide avenues for the operation of checks on the exercise of governmental power"); *Clinton v. City of New York*, 524 U.S. 417

Congress had aggressively encroached on another branch's power or had instead chosen to voluntarily cede its own power. *Compare Bowsher v. Synar*, 478 U.S. 714 (1986) (striking down attempt by Congress to assign executive powers to officer under its control) with *Clinton v. City of New York*, 524 U.S. 417 (1998) (invalidating congressional attempt to delegate to the President the power to amend Acts of Congress). This is because the separation of powers is not designed to safeguard the interests of those occupying public office; rather, its purpose is to protect the liberty of the American people.

In *Clinton v. City of New York*, Justice Kennedy explained why Congress may not voluntarily relinquish the powers vested in it by the Constitution:

> To say the political branches have a somewhat free hand to reallocate their own authority would seem to require the acceptance of two premises: first, that the public good demands it, and second, that liberty is not at risk. The former premise is inadmissible. The Constitution's structure requires a stability which transcends the convenience of the moment. The latter premise, too, is flawed. Liberty is always at stake when one or more branches seek to transgress the separation of powers.

524 U.S. at 449-50 (Kennedy, J., concurring) (citations omitted) (emphasis added).

It has long been established, therefore, that Congress may not freely delegate its legislative powers. This principle, commonly referred to as the nondelegation doctrine, traces its roots back to two of Europe's most distinguished and influential political philosophers. John

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(1998) (invalidating Line Item Veto Act); *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) (invalidating provision of Transfer Act regarding composition of Metropolitan Washington Airports Authority's Board of Review); *Bowsher v. Synar*. 478 U.S. 714 (1986) (invalidating portion of the Gramm-Rudman-Hollings Act); *INS v. Chadha*, 462 U.S. 919 (1983) (invalidating "legislative veto" provision of the Immigration and Nationality Act); *Buckley v. Valeo*, 424 U.S. 1 (1976) (invalidating composition of the Federal Election Commission as established by the Federal Election Campaign Act of 1971).

Locke, writing in 1690, stated that "[t]he legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others." Locke pointed out that the power vested by the people in the legislature was "only to make laws, and not to make legislators."[2] Montesquieu, furthermore, warned of the dangers that would result from allowing legislative and executive powers to be joined together: "When the legislative and executive powers are united in the same person or body, there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner."[3]

Justice Kennedy similarly observed, "That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow. Abdication of responsibility is not part of the constitutional design." *Clinton*, 524 U.S. at 452 (citations omitted).

It is not surprising, therefore, that the nondelegation doctrine emerged early in U.S. Supreme Court jurisprudence. In *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825), for example, Chief Justice Marshall wrote, "It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative."

Near the beginning of the 20th century, Congress began to delegate authority more frequently, and as a result, more cases involving delegation were decided by the Supreme Court.

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[2] John Locke, Second Treatise of Government, in the Tradition of Freedom 244 (M. Mayer ed., 1957).

[3] The Federalist No. 47, at 303 (C. Rossiter ed., 1961) (quoting Montesquieu).

In some of these cases, congressional attempts to relinquish legislative powers were struck down. See *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 227 (1924) (prohibiting Congress from delegating the "power to alter the maritime law"); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 87-88 (1921) (holding that the Lever Act, which made it unlawful for any person to charge unreasonable prices for "necessaries," amounted to a delegation by Congress of legislative power to courts); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920) (invalidating improper delegation of maritime law to the states).

In other cases, delegations were upheld; but in each of these instances, the Supreme Court made it clear that delegated authority must be accompanied by adequate congressional guidance. See, e.g., *Union Bridge Co. v. United States*, 204 U.S. 364, 386 (1907) ("[T]he Secretary of War will only execute the clearly expressed will of Congress. and will not, in any true sense, exert legislative or judicial power"); *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904) ("[T]he Tea Act does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable").

In *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928), a case like *Field v. Clark*, 143 U.S. 649 (1892), involving tariff adjustment, the Supreme Court attempted to synthesize its nondelegation doctrine precedents. In doing so, it recognized the importance of maintaining the separation of powers, *see id.* at 406 ("[I]t is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President"), while at the same time acknowledging that enforcement of the principle was not susceptible to a bright-line rule if the federal government was to remain capable of effectively exercising its substantive

powers. *See id.* ("In determining what [a branch of government] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of governmental co-ordination").

Striking a balance between these countervailing concerns, the Supreme Court set forth a new standard for assessing the constitutionality of congressional delegations, explaining that "if Congress shall lay down by legislative act an intelligible principle [to govern the exercise of delegated authority], such legislative action is not a forbidden delegation of legislative power." *Id.* at 409.

Implementing the "intelligible principle" test, the Supreme Court soon struck down two statutes for failing to set forth adequate standards to guide the conduct of the executive branch. In *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), it invalidated a section of the National Industrial Recovery Act (NIRA) authorizing the President to prohibit the interstate transportation of petroleum priced in violation of state-imposed production quotas. The Court complained that the statute "left the matter to the President without standard or rule, to be dealt with as he pleased." *Id.* at 418. Similarly, in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Court struck down another section of the NIRA, this one empowering the President to establish "codes of fair competition" in certain industries "for the protection of consumers, competitors, employees, and others, in furtherance of the public interest." The Court once again observed that Congress' grant of authority was open-ended, "set[tingl up no standards, aside from the general aims of rehabilitation, correction, and expansion described in section one [of the NIRA]." *Id.* at 541.

More recently, in *Industrial Union Dep't V.American Petroleum Inst.*, 448 U.S. 607, 674-75 (1980), Chief Justice Rehnquist argued in a concurring opinion that a provision of the Occupational Safety and Health Act of 1970 ran afoul of the nondelegation doctrine. In doing so, he identified the important functions served by the doctrine:

> (1) "ensur[ing] to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will"; (2) guaranteeing that the recipients of delegated authority are provided with "an 'intelligible principle' to guide the exercise of the delegated discretion"; and (3) facilitating judicial review of "the exercise of delegated legislative discretion."

448 U.S. at 685-86. See also *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part). The occasionally competing principle of governmental necessity has not eliminated the nondelegation doctrine, nor lessened the importance of the liberty concerns underlying its constitutional role.[4] The Court has often accepted delegations. *See e.g.*, *Yakus v. United States*, 321 U.S. 414, 422-23(1944) (wartime price controls); *Loving*, 517 U.S. at 772-73 (delegation to President of authority over armed forces); *Mistretta*, 488 U.S. at 379 (delegation to courts of authority over criminal sentencing); *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 559-60 (1976) (delegation to executive branch of authority to restrict imports threatening "to impair

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[4] Nor does the amorphous "public interest" standard from the Communications Act of 1934, grant to the FCC a license to legislate. While the "public interest" standard does allow the FCC to remedy certain inefficacies in telecommunications, *see AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), it does not grant to the Commission a plenary power to legislate in areas not envisioned by Congress. The transition to DTV coupled with "public interest" simply does not equate to a wholesale empowerment to legislate in congressionally undefined areas. *See, e.g., ALLTELL Corp. v. FCC*, 838 F.2d 551, 559 (D.C. Cir. 1988) (Commission rule affecting the determination of certain costs to local exchange carriers arbitrary and capricious because the decision had "no relationship to the underlying regulatory problem").

the national security"). But it has always done so with the caveat that laws enacted by Congress must contain some substantive intelligible principle constraining any exercise of agency discretion. When, as here, these standards are not met, an important component of the separation of powers, is ignored. When the separation of powers is ignored, then the proposed agency regulation is unconstitutional.

III. THE PROPOSED RULE MAKING CANNOT BE SQUARED WITH THE NONDELEGATION DOCTRINE

The governing test for unconstitutional delegations has remained constant since at least 1928. Congress cannot delegate rulemaking authority to an agency if it fails to "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *J. W Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). After twice striking down congressional acts as unconstitutional delegations in 1935, see *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), the Supreme Court sustained a variety of broad delegations of rulemaking authority as providing the requisite "intelligible principles."

The Court invoked the non-delegation doctrine in *Kent v. Dulles*, 357 U.S. 116 (1958), to preclude the Secretary of State from denying passports to certain individuals despite Congress' grant of broad authority to "grant and issue passports . . . under such rules as the President shall designate and prescribe." *See id.* at 129. The decision is particularly noteworthy because the Court invoked nondelegation principles in the foreign affairs context, where executive discretion reaches its zenith. See, e.g., *Clinton*, 524 U.S. at 445.

The Supreme Court accorded *some* interpretive power to administrative agencies in

Chevron USA. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). *Chevron* announced a rule limited deference to administrative decisions with respect to agency interpretations of ambiguous statutes. That deference did not grant to administrative agencies the ability to create new rules and regulations out of whole cloth, which are totally unrelated to congressional mandate, however. Here, for example, the Commission proposes to unleash a host of new requirements on broadcasters which have absolutely nothing to do with the transition to digital technology.[5] Legislating outside of the scope of congressional mandate in this fashion violates the principles of the nondelegation doctrine.

Power to interpolate "public interest" obligations into unrelated digital technology legislation is the very essence of the legislative authority granted to Congress (and not the FCC) by Article I. The distinction between the judicial and administrative functions illustrates the point. Judges interpret the law; they do not write rules or statutes. Judges "make [law] . . . as though they were 'finding' it — discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment).

In other words, courts first analyze whether the federal agency has been delegated the authority to enact the proposed regulations before moving to the more deferential *Chevron*

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[5] For example, under the proposed Rulemaking new burdens are placed on broadcasters by creating a new standardization plan for reporting, Proposed Rulemaking at ¶¶ 7-14, requiring broadcasters to place reports in public files on the web, Proposed Rulemaking at ¶¶ 26,31, requiring broadcasters to have discussions with viewers on the web, Proposed Rulemaking at ¶¶ 35-36. Congress has not delegated any authority to the FCC to create this new regulatory scheme.

analysis. For example, in *National Cable Television Ass 'n, Inc. v. United States*, 415 U.S. 336 (1974) ("NCTA"), the statute at issue there authorized the FCC to set fees that were "fair and equitable taking into consideration direct and indirect cost to the government, value to the recipient, public policy or interest served, and other pertinent facts." *See id.* at 337. The Court expressed concern that allowing the FCC to set fees that reflected its view of "public policy" would risk permitting an unconstitutional delegation of Congress' taxing authority. *Id.* at 342-44. To avoid this possibility, the Court interpreted the statute to allow fees to be set only with reference to the "value to the recipient." *Id.* at 344. The Court expressly invoked the non-delegation doctrine to narrow the statute: "Whether the present Act meets the requirement of *Schechter* and *Hampton* is a question we do not reach. But the hurdles revealed in those decisions lead us to read the Act narrowly to avoid constitutional problems." *Id.* at 342.

More recently in *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, *petition for rehearing denied* 154 F.3d 487, *petition for rehearing en banc denied* 154 F.3d 494 (D.C. Cir. 1998), the D.C. Circuit found the Commission's affirmative action hiring and recruitment policies to be an unconstitutional violation of the Equal Protection clause. *Lutheran Church*, 141 F.3d at 356. The Court called into question whether the necessary factual predicate had been established to substantiate the "diversity in programming" rationale as it had been applied to the Lutheran Church. In finding the "diversity" rationale implausible, the Court noted that the "Commission never defines exactly what it means by 'diverse programming.'" *Id.*, 141 F.3d at 354. The Court found it significant that: "[n]or did the Commission introduce a single piece of evidence in this case linking low-level employees to programming content," *Id.* at 356, in the

context of justifying its diversity rationale. The Court requested the FCC to justify the underlying basis for its authority to regulate in this area. *Id.* The FCC notably failed to supply such a delegated basis for its authority to the Court in *Lutheran Church*.[6] Likewise, no such basis for the regulations proposed in this Rulemaking has been properly set forth here, either.

In *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993), the Court challenged the Commission's justifications for an ambiguous policy that, "[d]espite its twenty-eight years of experience with the policy, the Commission has accumulated no evidence to indicate that it achieves even one of the benefits that the Commission attributes to it. . . ." *Bechtel*, 10 F.3d at 880. The FCC's various justifications for its determinations as to ownership were also deemed "implausible." *Id.* Thus, the underlying justification for the policy at issue was deemed "arbitrary and capricious." *See also, Bechtel*, 10 F.3d at 881 (rejecting the FCC's quantitative numerical formula for integration determinations); *id.* at 883 (rejecting the FCC's financial interest formula for integration determinations); *id.* (rejecting the FCC's legal accountability standards for integration determinations); *id.* at 884 (rejecting the FCC's integrated versus absentee owners standards); *id.* at 885 (rejecting as "sheer myth" the FCC's rationale that on-site owners are more informed about station operations and problems).

As in both *Bechtel* and *Lutheran Church*, the FCC has an amorphous term "public interest" which is undefined. This term, standing alone, is not the basis for a broad delegation to the FCC of rule making authority. The FCC has failed to articulate the basis for its legislative

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[6] The FCC's subsequent revised EEO requirements have also been challenged by numerous broadcast associations. *State Broadcast Assoc. v. FCC*, __ F.3d __ (D.C.Cir. 2000).

authority here, and the factual predicate necessary for creating a new spectrum of regulatory burdens for broadcasters. As such, the FCC has failed to fulfill the predicate for enacting this new legislation. *See e.g., Cincinnati Bell Telephone Co. v. FCC,* 69 F.3d 752, 763 (6th Cir. 1995) (rules concerning spectrum auctions arbitrary because Commission had no factual support for them).The FCC does not have the requisite authority to fill a conjectural vacuum, because the Commission, rightly or wrongly, perceives a need in that area. *See ALLTELL*, 838 F.2d at 560 (Local exchange carriers costs rule struck down because there was no showing that feared abuses actually existed).

For example, in *Amer. Truck Ass'n, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), *en banc* 195 F.3d 4 (D.C. Cir. 1999), *cert. granted* ___ U.S. ___, Nos. 97-1440, 97-1441 (consolidated) (2000), the D.C. Circuit struck down Environmental Protection Agency regulations as a violation of the nondelegation doctrine. Finding the EPA lacked the congressional mandate to "fill in the regulatory blank" which Congress had purportedly left open concerning soot standards, the Court stated:

> Certain "Small Business Petitioners" argue in each case that EPA has construed §§ 108 & 109 of the Clean Air Act so loosely as to render them unconstitutional delegations of legislative power. We agree. Although the factors EPA uses in determining the degree of public health concern associated with different levels of ozone and PM are reasonable, EPA appears to have articulated no "intelligible principle" to channel its application of these factors; nor is one apparent from the statute. The nondelegation doctrine requires such a principle. See *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

Id. at 1034. Similarly, the proposed Rulemaking here stands without the underlying congressional authority to promulgate such rules. The FCC has not been delegated the authority to make a conglomerate of new rules heretofore unassociated with the transition to digital

technology.

IV. Conclusion

For the reasons stated above, the proposed rules are outside of the authority granted to the Commission by Congress. The adoption of these rules would, therefore, violate the nondelegation doctrine.

Respectfully submitted,

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